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# **Judicial Independence: The Master Narrative in Sentencing Practice**

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## **Abstract**

This article draws on biographical narrative accounts of retired Scottish judges to provide insight about the operation of judicial independence in the routine practice of criminal justice. This oblique and often reified legal concept is given new meanings and understandings through the lived experiences of retired judicial actors, demonstrating its role as the ‘master narrative’ of the judiciary in their routine sentencing work. This research points to some of the adaptive judicial strategies necessary for the maintenance and reinforcement of the concept in the context of the everyday challenges of sentencing practice. It is argued that although judicial independence represents an aspirational conception of judicial work, this symbolic value also carries important meanings and has material effects in sentencing practice. Moreover, the boundaries of the judicial role in daily criminal practice may be less sharply defined than strong ‘Olympian’ interpretations of judicial independence would otherwise suggest.

## **Keywords**

Judicial independence, master narrative, sentencing, criminal justice, narrative research

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## **Introduction**

With a long history in legal and political thought, the concept of judicial independence remains central to the functioning of democratic legal systems today. This core rule of law concept holds the promise not only of an impartial institution which is constitutionally separate from other branches of government but also the commitment of individual judges to carrying out their duties ‘without fear or favour, affection or ill will’ (as the Scottish judicial oath puts it), thus offering a guarantee of equality for all people before the law.<sup>1</sup> Embodying important political and constitutional values and ideals, the concept has generated extensive legal and doctrinal scholarship largely focused on higher constitutional and appeal courts and mostly directed, in the UK, to the institutional arrangements which shape and structure the work of the judiciary (Shetreet and Turenne, 2013) and in the US, towards policy debates (Burbank and Friedman, 2002).

However, judicial independence has been the subject of very little empirical study in any jurisdiction regarding its meaning, operation and effects in criminal justice practice. Downes’ (1988) influential comparative study of penal culture identified judicial independence as a core element, suggesting also no necessary conflict between judicial independence and a collaborative professional ‘culture of tolerance’. Lacey (2008) observes that the nature and extent of judicial insularity is an important institutional

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<sup>1</sup> The wording of the Scottish judicial oath is typical in its linked allegiance to the rule of law and judicial independence: ‘I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will.’ More directly, judges in Finland simply promise ‘to render justice to poor and rich alike’.

variable in the ways in which systems of criminal justice respond to calls for increased penal severity. In more recent work, the concept continues to operate somewhat obliquely in the shadows of research about sentencing and its relationship to public opinion (e.g. Ryberg and Roberts, 2014) and in debates about punishment and democratic theory (e.g. Dzur, Loader and Sparks, 2016). As a key influence over penal decision-making and outcomes, judicial independence is necessarily implicated in these debates but rarely foregrounded. Moreover, a tendency to dismiss judicial independence as the ‘potent myth’ of a hegemonic judiciary (Cavadino and Dignan, 2007:105) along with some avoidance of close sociological exploration of legal doctrines (Lacey, 2008; Krygier, 2008) has led to this key institutional variable of penal power being overlooked in both its theoretical and practical configurations.

A developing field of study explores the role of emotions in judicial decision-making with insight about judicial impartiality as an informal norm of practice (Anleu and Mack, 2005; 2017; Mack and Anleu, 2010; Maroney, 2011; Bandes and Blumenthal, 2012; Maroney and Gross, 2014). However, little research has documented or explored the everyday meanings and implications of judicial independence as both a formal rule and a key organising principle of judicial work in criminal justice practice.

This article addresses this gap in knowledge, drawing for the first time on a series of biographical narrative interviews with retired Scottish judges to provide a novel empirical exploration of the ‘master narrative’ in everyday sentencing practice. From the vantage point of retirement, biographical narrative interviews provide space for retired judges to reflect on the challenges of judicial work in the context of their legal and judicial careers, illuminating the entanglement of individual life histories with core institutional narratives.

Working in the interstices between ‘law in books’ and ‘law in action’, the first section situates the concept of judicial independence in its global context, provides an overview of commonly encountered uses of the concept of judicial independence and explores assumptions about the judicial role and behaviour in criminal justice practice which underpin those understandings. An outline of the scope and methodological basis of the empirical research project is provided. The substantive section draws on narrative interviews to explore dimensions of judicial independence in penal practice such as the traditions of the judiciary; emotions and sentencing; engagement and distance. I argue that legal doctrines such as judicial independence matter, carrying important meanings and aspirations for judicial practitioners and exerting a practical force in penal practice which extends beyond any symbolic potency.

### **Constitutional Dimensions of Judicial Independence**

The right to be tried by an impartial and independent tribunal is protected as a fundamental international human right by Article 6.1 of the *European Convention on Human Rights* and Article 10 of the *Universal Declaration of Human Rights* and is routinely promoted by governments as a key pillar of democracy. Judicial independence has strong global currency, playing an important role in economic development through the regulation of property and other contractual rights (Mahoney, 2001; Feld and Voigt, 2003). It is also strongly advocated as a stable foundation for transitional states, ensuring important political, religious and personal freedoms and offering protection against corruption and tyranny (Larkins, 1996; Dyzenhaus, 2001; Herron and Randazzo, 2003).

Typically, attempts are made to protect judicial independence in democratic states through a complex web of legislative, constitutional and doctrinal measures aimed not only at broad issues such as the separation of powers but extending also to judicial appointments, tenure and training (Shetreet and Turenne, 2013). These substantive

measures operate alongside political and media conventions inhibiting direct criticism of individual judges and/or individual judgements. However, in recent politically turbulent times this core rule of law value has recently come to occupy centre stage, generating in the USA extraordinary personal attacks on individual judges and their judgements via the President's personal twitter account<sup>2</sup>. In the UK, a Supreme Court EU ruling on Article 50 resulted in the characterisation of the judiciary by the Daily Mail as 'Enemies of the People' (Slack, 2016). Elsewhere, and as a measure of the continuing salience of judicial independence, attempts by the Polish government in July 2017 to re-structure the judiciary in ways widely believed to present a major threat to judicial independence resulted in furious political debate, large demonstrations on the streets and threats of EU sanctions and suspension of voting rights.

Despite this global centrality, an attitude of strong scholarly scepticism towards the concept of judicial independence is evident. Extensively critiqued, the concept remains characterised by its opaqueness: defying conceptual precision (Stevens, 1999), difficult to observe or measure and easily characterised as 'a grab-bag of vague but salutary qualities' (Tiede, 2006:160). Critical legal scholars identify it as a reified account of the judicial role, noting the worshipful tone and 'rhetorical effluence' (sic) which accompanies its use (Cross, 2003), and its trumping 'say no more' quality when employed in opposition to judicial reform (Malleon, 1997). Indeed, the concept positively invites Tomlins' characterisation of a 'self-referential' discourse (Tomlins, 2000).

MacCormick (1992:5) provides the insight that if law is understood as a normative order, 'institution-concepts' such as judicial independence are useful ways of organising legal

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<sup>2</sup> For example, describing Judge James L. Robart, whose judgement put nationwide hold on President Trump's executive order denying entry to the US to refugees and others from seven predominately Muslim countries, a 'so-called judge'; and characterising Judge Gonzalo O. Curiel (when presiding over a class action lawsuit against Trump University) as 'very unfair. An Obama pick. Totally biased – hates Trump.' (Trump, 2016).

thought and understanding, and provide the basis for knowledge claims about law and its processes. In this way, scholarship usefully highlights the important legitimising and mythologizing functions served by legal doctrines which emphasise judicial neutrality and the rule of *law*, rather than of *people* (Thompson, 1975; Hay, 1975; Hall et al, 1978; Griffith, 1997; Burnside, 2009).

Several conceptual models that inform both criminological scholarship and narrative accounts of practice can be traced through two linked definitions and uses of judicial independence. The first signifies the independence of the judiciary as an *institution*, separate from the other branches of government and not placed under any undue influence, control or pressure from the other branches (Stevens, 1999, MacCormick, 2006, Beatson, 2008). The independence of the individual judge is sought to be assured by security of tenure, fiscal independence and by conventions relating to impartiality – the absence of ‘fear or favour’. A strong, ‘Olympian’ version of judicial independence is sometimes employed by governments and judiciaries in the UK to support judicial discretion and individualised sentencing, with implications for perceptions and manifestations of judicial power and authority (Ashworth, 1995; Tata and Hutton, 2003; Lacey, 2008; Tata, 2010).

The second use of judicial independence conveys ideas about the importance of the *impartiality and neutrality* of the individual judge in the performance of their everyday work. When used in connection with the sentencing process, this use is informed by understandings about the perceived ‘social service’ function of the criminal courts (Malleon: 1997) and the ‘emotional labour’ aspect of the judicial role (Anleu and Mack: 2005).

### **‘Sovereign Self’ and Realist Judicial Role Conceptions: Faith versus Suspicion**

Other binary oppositions are suggested by the mythological model of the judicial role. Many of the transcendental doctrines, rituals and symbols of legal positivism centre on the figure of the judge and represent something of a formal legal carapace. This is a formidable legacy and ties the figure of the individual judge closely to the symbolic and material legitimacy of the law. I describe this here as the ‘sovereign self’ model of judging conception which provides strong underpinnings for understandings about the practical independence of the judge as an autonomous figure largely impervious to the influence of any values or beliefs extraneous to law. Indicating some Kantian wariness about the intrusion of emotions or morals into rationality, this model eschews the question of emotion in judging and is animated by *faith* in law and legal judicial values.

By contrast, the realist model of judicial behaviour in criminological scholarship is rooted in an attitude of *suspicion* towards the judiciary. This model of judging has strong legal-realist underpinnings and draws heavily on the hegemonic and coercive function of the sentencing judge; in particular, the rhetorical and legitimating aspect of the role and the mythologizing concepts of judicial independence and the rule of law. This model informs a set of assumptions about the judicial habitus, particularly the ingrained dispositions and attitudes, patterns of thought and behaviour shaped by class, background and training (Bourdieu, 1987; Griffith, 1997; Hutton, 2006). The realist model in sentencing displays scepticism towards the concept of judicial wisdom and intuition and emphasises the arbitrary nature of judicial decision-making.

The present study demonstrates that judges draw substantially on both these interconnected understandings about judicial independence when narrating their everyday work in criminal justice.

### **The Narrative Project: Biographical and Institutional Memory**



The research on which this paper is based draws on a series of extended biographical narrative interviews conducted with a group of 12 retired Scottish Sheriffs and High Court judges. Reflecting its separate and quite distinct legal system, Scotland has its own judiciary and criminal justice system. Scottish Sheriffs, who deal with the majority of criminal cases, and High Court judges who deal with the most serious cases, are drawn from the two branches of the legal profession in a merit-based appointment system and are experienced advocates or solicitors. This presents a strong contrast to England and Wales where most criminal work is dealt with by lay magistrates, and may have implications for the narrative interpretation of Scottish judges' lived experience. Scotland's judges currently have wide discretionary sentencing power although some 'structuring' of their discretion may follow from the recent establishment of the Scottish Sentencing Council which has powers to issue sentencing guidelines.

The research explored contexts of judicial work and culture in everyday criminal justice practice through narrative accounts of judges' lived experiences. The experience of these judges on the Scottish bench spanned the second half of the twentieth century and the earliest years of the twenty-first century. As a juridical and ethical commitment to which judges, governments and scholars attach varying degrees of importance, judicial independence was one of the dimensions of judicial work explored with participants. Initial parts of interviews were orientated towards the participants' judicial lives and careers and in most cases broadened into more general discussions about their experience on the bench and aspects of sentencing practice. Ideas about judicial independence emerged as a central element of some narrated accounts of judicial work and role conception, whether operating in the shadows as an implied ethical constraint or explicitly foregrounded by the participants themselves.

Reflecting the 'narrative turn' in social sciences (Bruner, 1990, 2004; Freeman, 1993), narrative research is an interpretive approach concerned with the stories or narratives

which people use to communicate meaning and knowledge in the social world, and is aimed at eliciting reflective accounts of personal experience. The particular value of a narrative approach for the study of judicial work and culture is the focus on ‘human subjectivity and creativity’ and the ways in which individuals respond to ‘constraints and experiences’ (Plummer, 2001:3). Narratives serve other functions in social life such as remembering the past, where individuals use narrative to unearth and re-evaluate memories and personal experiences. Narrative is therefore closely bound up with questions about self, identity and the search for meaning (Josselson, 2004).

Every field of practice has at any given time a succession of stories in circulation (Czarniawska (2004). One way of gaining greater understanding about actors’ intentions is therefore to explore the ‘repertoire of legitimate stories’ of a particular group or institution. The judiciary can therefore usefully be regarded as a site of narrative production in relation to both its individual members and collectively as an institution. Nelken (2010:7) makes a convincing case for understanding actors’ intentions in criminal justice practice:

The social actors we are studying will not have all the answers to our problems (or their own). But whatever our objectives ... we will not get far if we do not do all that is possible to make sure we have a fair grasp of what they think they are doing (as well as what they are actually achieving) and try to find out why it makes sense to them – to the extent it actually does so.

Accountability provides an additional frame of reference for judges’ narrative accounts of sentencing. If punishment is a practice which appears morally wrong and needs defending (Duff and Garland, 2004), the judicial role in sentencing suggests some necessary equivalence in terms of answerability. As Czarniawska (2004:4) notes, people spend their lives ‘planning, commenting upon, and justifying what they and others do’ and this aspect of human communication may have particular resonance for the group of retired ‘professional punishers’ (Garland, 1990) interviewed in this study. Retirement, as

a major transition in the life course and a marker in the aging process, is likely to prompt in individuals some generation of the 'life review' (Freeman, 1993) and a quest for coherence (Riessman, 2004). The usefulness of biographical and institutional narratives for understanding dimensions of judicial work therefore lies in the functions they serve both for the individuals and the collective group, such as identity building and maintenance and the reinforcement of core institutional values such as judicial independence.

I present findings in three sections. The first part explores the various meanings and uses of judicial independence employed by the judges in the context of their work and in particular, its aspirational and enabling role; the second part examines several dimensions of the lived experience of judicial impartiality, in particular the narratives of isolation; finally, the complex interplay of emotions and independence in the performance of the judicial role is explored, concluding that the independent and impartial dimension of the judicial role in sentencing requires both distance *and* engagement.

### **Meanings of Independence in Sentencing Practice: Being 'Above the Battle'**

*Judge C* outlined the first meaning of judicial independence outlined above which relates to the independence of the judiciary as an institution; the separation of powers, freedom from undue influence from other branches of government and structural arrangements put in place to maintain judges' independence:

Well, on one level it meant a great deal because many of my [judicial] colleagues would be on their high horse about being called 'colleague' or.... what was the other one? [...]. 'stakeholder'! Ho, ho, that used to drive my colleagues berserk. And it annoyed me a bit, too, because, you know, the [judicial] office is an independent office. And especially if it [the mode of address] came from government. It seemed civil servants, and about half the MSPs [Members of the Scottish Parliament] were completely oblivious to the separation of powers. [.....] I had a colleague in [x Sheriff Court] who had a huge fight with his local

councillors, before whom he had to appear to ‘explain himself’. He went absolutely apoplectic. It’s [judicial independence] on that more basic level.

Other judges spoke about threats to judicial independence as a result of administrative interference, workload pressure, career structure, and complaints: cumulatively, described by one as ‘the loss of independence by 1,000 cuts’, by another as a form of ‘executive creep’. *Judge B*, a former High Court judge, provided useful insight about some of the ‘checks and balances’ which he believed protected judicial independence in practice. These were informal as well as formal means: communal dining, and the Appeal Court:

[.....] this whole system is full of checks and balances, all the time, because of the way the judges live in a kind of enclosed environment for the most part. On the whole, judges don’t go into pubs...they meet for lunch every day together, used to almost always eat altogether. In fact, they still do nowadays in Scotland; they all meet in the one dining room. And, of course, the Appeal Court is reviewing what you’re doing, so there’s a lot of checks and balances, and that I suppose is one of the guarantees of judicial independence.

*Judge M* observed that it was important to have a judiciary that is ‘not frightened of anything’. *Judge B* expressed this requirement in a similar way, alluding to some of the structural arrangements that made judges ‘untouchable’:

I suppose it’s to know that you are, in a sense, *untouchable* in terms of what you do, provided you don’t misbehave. Then...you should try to make something of your independence, and not be unduly influenced by what is thought to be the public mood which, as I say, is a very doubtful concept indeed.

But *Judge B* believed that recent changes to the composition of the judiciary in terms of age carried significant implications:

The result is that the bench has become younger, and to that extent, slightly less experienced and slightly *less* above the battle, if you like, just because older people tend to be slightly more remote, in a sense.

Much has been written about the extent to which the power of law, and particularly criminal law, relies on elements of performance, imagination and symbolism. Rieke (1991:43) notes that despite the aura of mystery created by judges' robes, raised benches, wigs and ceremony, judges 'do not at once acquire extraordinary powers of reasoning and molt their humanity' simply through the act of being 'elevated' to the bench. For Kahn (2006a), the performativity element of the judicial role is directed at stabilising the position of law in a 'highly contested symbolic field'. This competition is fought out in the realm of the imagination, and the law brings two resources to the debate: a conception of law as the product of the sovereign will – its democratic basis - and as the product of reason. A key element in the construction and the maintenance of this 'legal imaginary' is the personification of these traditions in the judge. This requires the transformation of the individual judge and the suppression of their individual subjectivity: in *Judge C's* earlier phrase, the ability to situate him or herself 'above the battle'. However, as Kahn (2006: 4) observes, even if no one 'fully believes' this legal fiction, it still has some force:

But everyone sort of believes. We believe it as a background assumption that sustains the rule of law. The suppression of the individual subjectivity of the judge is central to the judicial performance: the court, not the judge, speaks; the decision is always spoken in the name of the law, which appears to us as the will of the sovereign people.

Legal realists' critique of these normative claims (e.g. Kennedy, 1977) – that they represent transcendental nonsense – fails to explain the extent to which legal actors such as judges believe *themselves* to be constrained by law. Narrative has a role to play in explaining this middle ground between the formalism of law and naked individual or group preferences, capturing the idea of *integrity* or *ethos* in practice and placing it in the context of a shared community of commitments (Garver, 2004; Kahn, 2006b). Capturing some of these ideas about a strong, enabling and performative function of independence

for the actors themselves, *Judge A* offered this explanation of the ‘automatic’ operation of independence:

I wasn’t physically doing it: it happened. It was just a feeling; this just happened automatically. You realised .... I have to behave in a totally judicial manner.

*Judge B* spoke at length of the effect on judges of the traditions of the institution – of the panoply of wigs and gowns - and what he understood as the transformative effect of judicial office through his observations of a colleague rising to the challenge of impartiality in the face of what he considered unpromising beginnings:

One of the most remarkable judges was a man I ultimately came to admire, having disliked him intensely, Lord x [...]. He came from the traditional background. His ancestors were on the bench. He himself went to [...] school and went to Oxford [University][.....] and then to Edinburgh [University]. And he acted invariably for the NCB (National Coal Board) rather than the NUM (National Union of Mineworkers). But when he went on the bench, to my astonishment he was an excellent, absolutely excellent judge. And... *totally fair*.

He continued:

And once you get up there, the great thing - they said this of the American Supreme Court too - is that it doesn’t matter in one sense who you appoint: the traditions of the institution can be so powerful that it changes you. It *makes* you independent. Another thing which I’ve often said [.....] is that when we go on the bench, we wear a wig and a gown, and a special gown and a special wig and a different gown for criminal cases etc. And the purpose of that is not to frighten the punter or to impress the public. The purpose of that is to remind you who you are, to remind you that you’re not just [name] earning so much, and looking to a pension, and with his background. That [...] you’re exercising a great power on behalf of the people through the state [...]. So that’s why I still advocate the wearing of wigs and gowns, for it helps to remind you who you are. So, the institution is very important, and the whole tradition.

These accounts point to a strong enabling role for the concept of independence and impartiality. Berman (2001:120) makes the case for taking seriously these subjective accounts of belief in legal principle:

... only by taking the judges' belief seriously will we become aware of the possibility that the belief itself might function as a constraint on judicial discretion. Thus, judges who believe in legal principle and repeatedly tell themselves and the world a story about both the non-ideological nature of their work and the substantial constraints on their discretion may, in fact, be more constrained in their decision-making, regardless of whether or not a critic can 'prove' that such constraints are illusory.

This understanding has implications for the study of judicial independence in penal practice. Although criminological scholarship regards judges in their sentencing role primarily as *penal* rather than *legal* actors, there is value in being attentive to judges' own frameworks of meaning and, in particular, how they orient themselves in legal and penal thought. By virtue of their lengthy legal education, training and experience, Scottish judges' accounts of sentencing practice in this study drew heavily on their identities as *lawyers* as well as judges and on the legal doctrines which circumscribe and define their judicial role. For these judges, therefore, sentencing is as much a legal as a penal practice. To this extent, the master narrative of judicial independence, however mythical or illusory, may act to strengthen and enhance the performance of independence in everyday sentencing practice.

### **Independence as a solitary practice**

The common conception of sentencing as the solitary burden of the individual judge should be qualified by awareness of the extent to which the sentencing task is shaped by earlier processes and collaboratively performed with other criminal justice actors

(Shapland, 1987; Hutton, 2006; Tata, 2007). Nonetheless, the accounts provided here indicate that sentencing was experienced by the judges *themselves* as a solitary exercise. Several cited the intrinsic loneliness of judicial work as a challenging factor of judicial work, stemming from the need to take the ultimate decision independently of others. *Judge M* explained the nature of the problem:

I think you're probably more lonely than you realise. [...] You don't really talk to anyone. You're taking big decisions, but not really talking to anyone about them. You're constantly trying to resolve things that are not easily capable of resolution. I would guess...the kind of...level of breakdown, health or whatever, is not all that high, actually, of the judges, as far as we know, but there may be coping strategies that you're adopting that you don't know about. I remember going to a lecture by a psychiatrist and he said that in any organisation, the first thing that people that belong to it did was to make arrangements for their own self-protection.

*Judge M* returned to the question of judicial isolation to impart what he called 'the most important thing' he thought he could tell me - the importance of always having 'a little bit of ice in your heart' in order to perform the role in a neutral manner:

I think it was the sense of isolation. [...] It's not a thing that you're particularly well prepared for [...] ...in fact, this is probably the most important thing that I could say to you. You [judges] are in a unique position. You're being asked to do something that other people *could* do, but in this particular case they are not being asked to do it - *you* are being asked to do it, only *you* can do it, and you can't get help from anyone, and the responsibility is yours to do it. And it may be in a situation which you feel for one reason or another uncomfortable because you're not ... among friends, or anything like that. Not among hostile people necessarily, but I think there has to be a sense of isolation there.... You know they say that writers have always got a little bit of ice in their heart? [...] To be uninvolved and emotionally uninvolved and...not unduly swayed by inappropriate things. I suppose...to be neutral.

It was evident from several accounts that these cultural meanings and associations regarding the judicial role were central to judges' own self-image, influencing their performance of the role and the way they attempted to manage the personal challenges



and demands of the work; for example, when reflecting on the challenges of judicial work, they judged their own performance and conduct against the idealised ‘sovereign self’ model of judging outlined above, invoking it as an aspirational rather than necessarily representative role model. *Judge M* expressed it this way:

... to operate properly as a Sheriff, you have to have the self-image of nobility, competency, mental robustness... independence, the ability to make up your own mind...

In later interviews *Judge M* spoke about the personal challenges of being a judge and the danger that judges’ own perceptions of what they should ‘look like’ to the public would prevent them obtaining help. Several judges thought they should have better access to pastoral and support services, and one described the ‘hurdle’ of self-image:

I think it’s now being acknowledged that there may be certain instances in which sheriffs or other judges may need help from... stress and strain manifesting itself through ill health, drinking, that kind of thing. And I think that must be a good thing. [...] But it would have to get over this hurdle of the judges’ self - image. They’d have to think that they could get help without acknowledging that they weren’t up to doing the job. That would be the great difficulty.

I asked this judge if there was anything positive to be gained by more openness about the stresses and challenges of the judicial role. He replied:

Now.... that’s an absolutely huge question, though you put it very briefly and charmingly. But...the idea of the ideal judge is pretty much like the idea of what God would be like, isn’t it ...strict but kind. And ...I don’t see how you could have a model that was any different, really. You would have to have something that you aspired to. [...] I think you would have to have...an ideal for the judges; not that they’re fallible, because if they weren’t you wouldn’t need an appeal court. That they are *reliable*. Maybe that’s the best word.

This discussion suggests that the idea of seeking help may run into difficulty with judges’ public and self-image, and has implications for judicial training and provision for pastoral

and support services. However, in relation to conceptions of judicial independence it is possible that a younger generation of judges may have less attachment to this strong ‘sovereign self’ judicial persona and hence less difficulty with admitting some temporary lack of ‘reliability’.

### **Independence as ‘Distance’ and ‘Disengagement’**

In this section I consider judicial accounts of sentencing which challenge conventional understandings of judicial independence as necessitating ‘distance’ and ‘disengagement’. The ‘sovereign self’ model of judging which emerges in the narratives above embodies Kantian wariness about the intrusion of emotion into rationality and is a key element in the symbolic construction of the judge. However, this strict demarcation between reason and emotion is contradicted by research which suggests that emotions and other affective states are central to decision-making and should not be regarded simply as obstacles in the way of rationality. Neuroscience points not only to ways in which affective states precede and induce certain dispositions, behaviour and judgements, but also to the benefits of ‘negative’ as well as ‘positive’ emotions and their role in producing ‘empathetic impartiality’ (Thiele, 2006). Nussbaum (1995, quoted in Thiele 2006: 187) captures the interconnected role of emotions in practical judgement:

[judges]...who deny themselves the influence of emotion deny themselves ways of seeing the world that seem essential to seeing it completely.... Sympathetic emotion that is tethered to the evidence, institutionally constrained in appropriate ways, and free from reference to one’s own situation appears to be not only acceptable but actually essential to public judgement....

In the courtroom setting, Bandes (2001) notes the pervasiveness and inevitability of judicial emotions and argues that purposefully employing emotions alongside reason holds the potential for more just decisions. Maroney (2011) advocates letting go of ‘the

script of judicial dispassion' and proposes a model of judicial emotion regulation to help judges manage their work.

On these accounts, harnessing emotions may be important in the exercise of good judgement. However, limiting personal *displays* of emotion remains central to conceptions of good judging, as evidence of the judge's impartiality and independence. The judiciary shares with other professions a cultural and normative expectation of 'disinterestedness' on the part of its principal actors (Parsons, quoted in Anleu and Mack, 2005: 599), but the heightened cultural meanings and associations of neutrality and independence which are carried with our conceptions of judging may explain the greater onus placed on the management of judicial emotions.

Several judges interviewed for this study were quick to acknowledge the presence of emotion in sentencing practice and gave examples of situations and strategies they employed to manage its effects. *Judge L* condensed his advice in the brief statement that one should 'never sentence if tired, emotional or hungry'. Others explained that they sometimes deferred sentence to the following day or removed themselves from the bench in particularly difficult cases. *Judge C* was typical of many in this account of 'going off the bench':

Sometimes you *are* affected by it, you know. I have been affected by even the prosecutor's account of what's happened to certain people in rape, or attempted rape, or any sexual offending, especially to children. But you've got to take a very common-sense view of it and I think the vast majority of us are well aware of the need to take time. You know, if you get a particularly harrowing case [...] I go off the bench frequently, to not make an instant and perhaps angry judgement for a start, and secondly, to check up, particularly in the case of photographing, pictures of children and stuff like that, which [...] are absolutely gross and upsetting. [...] The benefit is to give you time - if you're angry, which frequently you can be. Or if you're genuinely upset because of the distress in people you see in court. And we all have feelings, obviously. And so, you go off [...] and I know my colleagues have done that as well: (a) to

have a cup of coffee and not immediately think about it and then (b) to check up on the most fair way of dealing with it.

*Judge B* explained the need to ‘get away from the scene for a while’ and why he sometimes took advantage of an adjournment before sentencing:

...sometimes, if the whole atmosphere was very charged [.....] sometimes it was highly desirable to get off the bench and come back the following day. Sometimes [....] if it was a murder case...there’s obviously cases involving children, or sometimes where... you get some kind of battle breaks out which results in the death of one member of a family and the conviction for murder of a member of the other family - the Capulets etc. So, if you get this kind of battle - two families are destroyed by the thing - that can be very, very moving when this, all this comes out. And it’s also extremely common, as you know, in the High Court, when there are situations like that - two families involved, the accused’s family, friends and the victim’s family and friends - for them to be in the court. And there’s a lot of public reaction there [.....] there can be shouts of ‘NO, NO, NO...’. So, there’s a lot to be said for just getting out of that atmosphere before you pronounce sentence, because every sentence should always be done with deliberation, rather than as a response partly influenced by the public mood.

These accounts demonstrate the ‘emotional labour’ aspect of the judicial role (Anleu and Mack: 2005) requiring the management of judges’ emotions and suggesting independence in the sense of both *effect* and *affect*: first, indicating the power of a concept which has a rhetorical or legitimating effect where appearances might demand one (to buttress the daily operational demands and compromises). Secondly, while suggesting the play of some elements of role distancing (Tombs and Jagger, 2006), also indicating a coping strategy purposefully affected or adopted by actors to allow the necessary psychic distance to perform the sentencing role. Garland (1990:236) draws attention to the least developed dimension of the transformation of our sensibilities about punishment: sympathy for offenders and the improvement of penal conditions, arguably the result of ways punishment is organised so as to minimise and disguise the violence entailed in its routine practice. Several elements of the ‘structure of social cooperation’ (Sarat and

Kearns, 1995:236) required to overcome cultural and moral inhibitions about the violence of punishment can be identified in judges' descriptions here of various coping mechanisms adopted by them such as attempts to control displays of emotion and to temporarily disengage from both the offender and the process of punishment itself.

### **Congruent modes: disengagement and engagement**

For Bourdieu (1987:820), the rhetoric of judicial neutrality, along with the linked concepts of autonomy and universality, represents the quintessential judicial attitude: it is 'the internalized manifestation of the requirement of disengagement' which operates as the 'entry ticket' into the field. However, some challenge to this necessity of disengagement is provided by several judges' accounts of changes in sentencing practice in the course of their careers. For example, several judges believed their involvement in the operation of Drug Courts represented a marked change in their conventional judicial role. *Judge M* identified a major change in the relationship between judge and offender which involved 'hearing' the accused's voice for the first time:

When things like drugs treatment testing orders (DTTOs) came in [.....] you were in a totally different relationship with the accused, and that's a kind of high point. Well, you *talked* to them for one thing. Quite often, you're sending someone down and you have no idea what their voice sounded like [...] They appear, plead guilty and they've got solicitors [...] they just sit there looking either pleased or worried, and the solicitor speaks for them.

Problem-solving courts and other new approaches which require sentencers to communicate directly with offenders and to establish a 'therapeutic' relationship with them, rely on an understanding that the authority of the judge plays a substantial role in

the promotion of broader justice goals, enhances the legitimacy of court processes and may also improve outcomes for offenders. (McIvor, 2009; 2011; Tyler: 2003). Suggesting some willingness to balance seemingly competing elements of punitive and therapeutic justice in their role, several judges spoke of wanting to ‘keep tabs on the situation’ of an individual offender by using the deferred sentence option. Others indicated they would like to become more involved in the ongoing management and review of cases:

I got to the stage where I began to wonder if we should do something like the French do and have a judge who is in charge of the person carrying out their sentence [.....] a *juge des peines* [.....] simply to see the person and see how they’re getting on. You’ve always got to allow for being fooled and taken in because to an extent you’re dealing with rascals. But to an awful extent you’re dealing with people who have got in a helpless kind of mess. And it was a constant theme that, you know: ‘Thank goodness someone’s interested in me even though I’ve done this’. [Judge M]

Continuing this discussion about extending the judicial role, *Judge M* expressed his discomfort at ‘washing his hands’ of the offender once he’d sentenced him to imprisonment. He envisaged a role for the judge in visiting the accused in prison, or having the accused come to see them for a review, possibly with a view to reduction of sentence if good progress was being made. He mused on the strangeness of the sentencing decision from the offender’s point of view:

You take this huge decision [.....] but you don’t know how they’re going to get on, how they’re going to behave in prison and [...] that struck me as very odd [...]. I thought judges should be involved in that. I thought if they send someone to prison they should be involved in how their sentence was served. Speak to them. [...] You could even say to them, you know, “What’s going on here? I sent you to prison and now you’re fighting with the staff!” [...] I wonder if there’s something we’ve missed here, because if you’re in the dock, and someone you’ve never met listens to stuff about you, takes a couple of years out your life and never sees you again [.....] it’s *bizarre* if you look at it, in that kind of way.

These accounts of judges talking directly to the offender and wanting to review the progress of the sentence allow a nuanced understanding of judicial independence when understood as requiring some disengagement from the accused. They also suggest that the powerful norms of social avoidance which Garland (1990) observes in relation to punishment may be attenuated in unexpected ways in judicial practice and raise questions about the extent to which the distance between judge and offender can or should be breached.

US Judge Wald (1995) believes that institutional arrangements and doctrines such as judicial independence matter: they can either ‘invite restraint’ or ‘ease the path to violence’ and excess. In particular, Wald is critical of constitutional doctrines and practices which distance judges from their responsibility by means of abstraction or depersonalisation, favouring instead arrangements that require judges to ‘confront the pain their decisions authorize, condone or ignore’ (1995:82). Enabling judges to monitor sentences, visit offenders in prison, work in problem-solving courts and to engage with penal organisations and reform programmes may be practices that would meet Wald’s objection to ‘distancing’ practices. However, this involvement may carry other implications for judicial training and management of the challenges entailed in this work. In a conversation about the occupational stresses entailed in sentencing, *Judge M* spoke about judges ‘making arrangements for their own self-protection’ and admitted to some moral ambiguity:

How do people [judges] cope? I would guess by *not* always knowing the full consequences of what they’re doing. Well, probably not *wanting* to know. [.....]. You talk to families and you hear horror stories about the effect on people simply in terms of things like simply travelling to the prison to see the prisoner [.....]. I suppose what I’m saying is that I don’t think that judges have always been educated about the full consequences of what they’re trying to do. Whether or not that’s a good thing or not, I honestly don’t know.

## Conclusion

In this paper I have attempted to dispel some of the ‘sociological innocence’ (Krygier, 2008:45) that exists in penal scholarship about the concept of judicial independence in criminal justice practice. As Krygier notes, reasons for avoidance of close sociological exploration of legal doctrines include some sense that they are ‘too normative, too legal, too political, too formal, too disconnected from life’ (2008:45). As the central organising principle of the judicial role, judicial independence can be regarded as the master narrative of judicial work in sentencing and while it invites criminological suspicion because of its oblique nature and mythologizing and legitimising functions, exploring judges’ accounts of judicial independence in penal practice provides valuable insight about its ongoing meaning and relevance, the challenges it presents for judges in their work and some of the strategies employed to manage those tensions. New insight is gained about the importance of the constitutional traditions of independence for some judges and about the meaning of independence and impartiality in routine sentencing practice.

Just as the constitutional function of judicial independence is more accurately described as the *balancing* rather than strict *separation* of powers (Stevens, 1999), the insights gained from this study suggest that independence for the individual judge lies in the *balancing* rather than *separation* of rationality, intuition and emotions and opens up space for considering more closely the occupational challenges and demands of judicial work. For these retired judges, some sense of shifting role boundaries emerged from their accounts of their late judicial careers, with implications for the balancing role of judicial independence today. In particular, new approaches to judicial work which require sentencers to communicate directly with offenders, to establish a ‘therapeutic’ relationship with them and to understand the social context of offenders’ lives, raise questions about the extent to which judges are equipped to balance these new interpersonal dimensions of their sentencing work, and the broader range of



communication and management skills now needed in the everyday performance of their judicial role (Tata, 2018).

One consequence of the benign neglect of legal concepts such as judicial independence in criminological scholarship is an under-theorized and relatively undeveloped understanding of judicial work and culture in criminal justice work. More pointedly, Lacey (2007:195) notes that legal doctrines are ‘discrete objects of criminal justice knowledge’ which merit close examination and are as important for criminal justice as the rest of the process:

Once we have conceived criminal justice as an integrated process with certain complex functions, it almost amounts to bad faith to place so much emphasis on these doctrinal values at one stage of the process while virtually ignoring them at the other. (Lacey, 1987: 222)

Thus, while adherence to doctrinal values such as judicial independence may not alone guarantee substantive justice, the weight attached to these values by judges in practice may make an important contribution to wider goals of fairness of outcome. Moreover, notwithstanding the ‘Olympian’ (Lacey, 2008) version of judicial independence sometimes invoked by judges in the UK to ward off perceived government interference in judicial discretion, more active and engaged forms of judicial work in sentencing increasingly present a challenge to this strong, idealized ‘sovereign self’ version of judicial independence. This study highlights other enabling functions of the concept which enable judges to perform their everyday judicial work in criminal justice. This role conception suggests continuing mindfulness of the need for judges to maintain ‘distance’ from their audiences but increasingly questions the nature and scope of that relationship, particularly in relation to the offender. This study of the doctrine of judicial independence in sentencing work provides insight about ways in which this master narrative, embedded

deeply in the judicial habitus, is explained and enacted in practice, and may be adapted to meet new ways of performing justice in the future.

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